2008

Seadhna J. Flores vs. David G. Earnshaw : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SEADHNA J. FLORES,	:	Case No. 20080102-CA
Plaintiff/Appellee,	:	
Vs.	:	
DAVID G. EARNSHAW,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

From Order and Judgment Entered January 14, 2008
by the Second Judicial District Court, Weber County
Honorable Michael D. Lyon, Presiding

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF ISSUES /STANDARD OF REVIEW

1. Whether the trial court erred in concluding that the real estate purchase contract was ambiguous in the manner alleged by the buyer, Plaintiff Seadhna J. Flores. Whether a contract is ambiguous is a question of law, which is reviewed for correctness, *Interwest Construction v. Palmer*, 923 P.2d 1350, 1358-59 (Utah 1996), according no particular weight to the trial court construction. *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985) It is important to note that the trial court made its conclusion on the basis of "uncertain meaning of the parties' *intent*." (R. 101) (emphasis added) However, there was no contention that the contract was other than "a fully integrated and binding agreement." (RR. 131-32, ¶11) In such a case, parol evidence is not available "to vary or contradict the terms of the writing...." *Union Bank v. Swenson*, 707 P.2d 663, 665 (Utah 1985) Therefore, it was error for the trial court to reform an unambiguous contract on this basis. These issues were preserved in Defendant's post- and pre-trial briefs (RR. 090, 053) arguments at trial (TR 162, lines 8-13) and Objections to [Plaintiff's Proposed] Findings of Fact and Conclusions of Law (RR. 111-13).

2. Whether the trial court's findings about the parties' intent were clearly erroneous. Questions of contractual intent, as determined by extrinsic evidence, are questions of fact subject to the "clearly erroneous" standard of review. *Fitzgerald v. Corbett*, 793 P.2d 356, 358 (Utah 1990) When challenging a district court's findings, the challenging party must show that the evidence, viewed in a light most favorable to the district court, is legally insufficient to support the contested finding. *In re Sonnenreich*, 2004 UT 3, ¶45 n.14, 86 P.3d 712 This issue was preserved in Defendant's evidence and arguments at trial (TR 167, lines 14-18, TR 173, lines 22-25, TR 174, lines 1-3) and Second Supplemental Trial Brief (R. 090).

STATEMENT OF CASE

Plaintiff filed this action for specific performance and breach of contract. (R. 001) The contract in question was a Real Estate Purchase Contract dated May 1, 2006 (the "REPC") (Addendum A hereto). The REPC concerned the sale of a condominium unit in a building that had not been constructed. Plaintiff alleged that "on, or about, May 16, 2006, Defendant, in writing, repudiated the [REPC] and, since that time, has refused and failed to honor the terms and conditions of said contract." (R. 002, ¶ 5)

In his Answer to Complaint (R. 025), Defendant admitted the REPC, but denied the claim of repudiation and breach with the allegation that Defendant "has consistently stated his intention to abide the REPC [sic]." (R. 026, ¶ 5) Defendant made the foregoing clear in his Counterclaim:

1. Plaintiff claims that he is entitled to the property with all the build-out items listed in Section 1.1 of the REPC.

2. However, Section 1.1 makes plain that those items are included with the sale "if presently owned and attached to the Property."

3. They are not; the property has not been built.

4. They will not be built and included with the property unless [P]laintiff states his willingness to pay for them, which (so far) he has not.

5. In fact, [P]laintiff has stated his intention to acquire the property for the agreed price with all of the build-out items even though they are not required by the REPC....

R. 027

As the Court can see, the dispute centered on Section 1.1 of the REPC:

> **Included Items**. Unless excluded herein, this sales includes the following items *if presently owned and attached to the Property*: plumbing, heating, air conditioning fixtures and equipment, ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; garage door opener and accompanying transmitter(s); fencing; and trees and shrubs....
>
> Addendum A hereto (emphasis added)

It was undisputed that none of the "Included Items" was "presently owned and attached to the Property;...." This was because the building did not exist at the time the REPC was signed. (R. 083)[1]

The case was tried to the bench on September 21, 2007. (R. 076) Plaintiff and Defendant were the only witnesses. The trial court received a number of exhibits, including the REPC. At the close of the evidence, the trial court heard the arguments of counsel. There was a preview of the problems with the trial court's decision from its question to Defendant's counsel:

> But I've also understood the law to mean that the Court may, in some cases, look at parole evidence to interpret a provision that *maybe on its face is not ambiguous*, but then having looked at it in the light of the parole evidence it now is susceptible to read [sic]. Would you agree with that?
>
> TR 162, lines 2-7 (emphasis added)

The answer of Defendant's counsel was emphatic: "I'm afraid not. I'm afraid not. That's not...my understanding of the law." (TR 162, lines 8-13)[2]

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[1] "'Unit No. 402' was yet to be constructed at the time the REPC was signed."

[2] Which was shown to the trial court in Defendant/Counterclaim Plaintiff's Supplemental Trial Brief (R. 053), Second Supplemental Trial Brief (R. 090) and Objections to [Plaintiff's Proposed] Findings of Fact and Conclusions of Law (R. 109).

After further discussion, the trial court's question was refined: "Then why don't I just reform [Section] 1.1 to say in this case that the parties intended to have a built-out unit." (TR 173, lines 22-24) Here was an explicit understanding that the parties' contract did not provide for a "built-out unit."

To make matters worse, there were several indications that the trial court considered the REPC to be unambiguous, *e.g.*: "[I]f I look at [Section] 1.1 all by itself, and, you know, without hearing anything about the case,....And as I read that, I said to myself on its face, it appears to be unambiguous. It means that they – he [Plaintiff] gets a roughed in space, and he's got to pay the rest for all the built-ins. And I think most people would probably agree with that,...." (TR 181, lines 13-21)

By the end of argument, the trial court's question had been fully refined: "[I]f...I learn by extrinsic evidence that there is no property for these furnishings to be attached to, does that create an ambiguity?" (TR 197, lines 8-11) This became the trial court's ruling:

> In this case, Earnshaw used a REPC that is normally used in the sale and purchase of an *existing* piece of improved real estate. Hence, a provision defining items included in the sale "if presently owned and attached to the property" clarifies what is usually included in the sale. However, Earnshaw used a REPC when no physical structure or improved real estate existed. In fact, no discernible street address, as referenced in paragraph 1, even existed except, perhaps, in a plat in

> the county recorder's office. Therefore, placing the parties in the position they found themselves when they executed the contract, the court concludes that paragraph 1.1, referencing items included in the sale of the property...creates an uncertain meaning of the parties' intent, a facial deficiency, and an impression that other terms are missing.
>
> R. 101 (Addendum B hereto) (emphasis in original)

However, it is clear that the trial court was confusing the concept of contract interpretation with integration: "Accordingly, extrinsic evidence is needed to ascertain the parties' intent with respect to that issue [whether the REPC required conveyance of a fully-built condominium unit] only, not the contract price. *Otherwise*, the court finds that the REPC is *fully integrated* for the contract price of $144,950." (R. 101) (Addendum B hereto) (emphasis added)

The problem is that the parties never disputed that the REPC was "a fully integrated and binding agreement." (R. 131-32, ¶11) In fact, they made this one of the "Findings" of the trial court. *Id.*[3] In his Objections, Defendant cited *Union Bank v. Swenson*, 707 P.2d 663 (Utah 1985): "This means that parol evidence is inadmissible 'to vary or contradict the terms of the writing once it is determined to be an integration.'" (R. 111 *quoting* 707 P.2d at 665)

[3] These findings were voluntarily made by Plaintiff after Defendant's Objections (R. 109), which were withdrawn when Plaintiff made the changes (R. 114). (The findings are attached as Addendum C hereto.) In case there is any question, the Court should consider the integration clause in the REPC (Section 14). (Addendum B hereto)

Since this was after the trial court's ruling (R. 095), it was necessary for Defendant to explain: "The only way for the Court to do what it has done in this case is by way of its legal conclusion that the REPC, specifically, ¶1.1, was 'ambiguous.' However, even that is problematic because the Court's introduction of extrinsic evidence appears to contradict the plain and unambiguous terms of ¶1, but [D]efendant is not arguing that point, by way of these objections, since it does not go to the form of the Court's findings and conclusions." (RR. 112-13) Defendant is arguing that point on appeal.

From the foregoing, the Court should see another problem with the trial court ruling: The trial court limited introduction of extrinsic evidence to that single contract term the trial court determined to be ambiguous: "Accordingly, extrinsic evidence is needed to ascertain the parties' intent with respect to that issue *only*, not the contract price." (R. 101) (Addendum B hereto) (emphasis added)

The problem here is that the evidence concerning whether the parties intended to convey a fully-built condominium unit was inseparable from evidence about the contract price. Defendant admitted that he intended to convey a fully-built condominium unit, but only for the agreed price of $184,950. Defendant's testimony was supported by all the undisputed evidence:

1. Defendant started marketing the project, on the Internet, in "February, March [2005] – somewhere around there." (TR 86, lines 24-25, TR 87, lines 1-6)

2. Defendant was done making changes to the web site within a month of the site going live. (TR 148, lines 19-24)

3. From that time on, the price advertised for Plaintiff's unit was "$184,950." (TR 87, lines 21-25, TR line 1)

4. This was several months before Plaintiff showed an interest in the project. (TR 25, lines 2-10)

5. At that time (December, 2005), Plaintiff was referred to Defendant's web site where he could see the price. (TR 28, lines 6-17)

6. Plaintiff admitted he went to Defendant's web site before buying the unit. (TR 28, line 25, TR 29, lines 1-7)

7. Page four clearly stated: "Unit prices start at $184,950." (TR 30, lines 1-25) (Addendum D hereto)

8. Plaintiff admitted seeing this page, but denied seeing the "$184,950" price. (TR 34, lines 19-25, TR 35, lines 1-20)

9. Defendant testified: "And I know we [Plaintiff and Defendant] talked prices, because all of them were the same price. So that's what I started out." (TR 83, lines 3-4)

10. Defendant testified: "Right before I started the job, I knew that in order to make a profit on there, I had to sale [sic] each unit for such a price so that – because I had the expenses of building it. And if I cut all – that's why I was at $184,950." (TR 83, lines 17-21)

11. To be clear, Defendant testified there was no way for him to make a profit on the unit at $144,950. (TR 83, lines 22-25, TR 84, lines 1-2)

12. As a matter of fact, Defendant sold all the small-sized units (8) for a minimum of $184,950. (TR 88, lines 18-25, TR 89, lines 4-6)

13. The only exception was a woman who paid slightly more: $185,000. (TR 89, lines 1-3)

14. There was even a small-sized unit on the floor directly below Plaintiff, which was underneath the parking lot, but sold for the same price. (TR 95, lines 13-23)

15. Defendant could not remember if Plaintiff was the first to buy a small-sized unit: "There were so many people coming in,....As soon – just right after I put the trailer up and the time [sic], people started calling me." (TR 90, lines 11-22)

16. However, the evidence showed that the first such unit was sold to an attorney a few days before. (TR 125, lines 18-25, TR 126, lines 1-19)

17. Defendant testified that the Option Agreement was typed by an assistant from Defendant's notes. (TR 93, lines 2-24)

18. Defendant believes it is possible he hand-wrote "$144,950" on the draft. (TR 96, lines 21-25, TR 97, lines 1-5)

19. However, Defendant acknowledged another possibility: that his assistant misread "$184,950" as $144,950. (TR 97, lines 6-20)

20. Either way, it was plainly a "mistake" because Defendant did not sell any of the small-sized units for less than $184,950. (TR 97, lines 21-23)

21. Defendant did not sell any of the units, even the large-sized units, "for less than the list price." (TR 98, lines 2-3)

22. Defendant testified there was no reason for him to offer anyone a discount: "I had two pages of people that were calling just to get on the list in case somebody else couldn't buy it." (TR 98, lines 4-25)

23. Defendant testified that none of the buyers of the small-sized units "dropped out." (TR 99, lines 2-14)

24. Defendant testified he was not surprised by Plaintiff's mortgage commitment of $129,600 (TR 100, lines 8-22), which was faxed to Defendant after Plaintiff signed the Option Agreement:

> I don't think it's my duty to find out how much people are going to borrow, and, you know, most of the people in the complex are paying cash for a half a million dollar project. So – and most of them are, you know – investment buyers. They have to put up 20 percent, which is $40,000, $50,000. But then, it's not my concern how much they can afford and what they can't, because I'm assuming that he [Plaintiff] would have to borrow the $129,000 and put the rest up in cash.
>
> TR 100, lines 24-25, TR 101, lines 1-7

25. Unfortunately, the mistaken price in the Option Agreement was transferred to the REPC. (TR 104, lines 14-24)

26. Defendant did not discover the mistake until after signing the REPC, at the time he was arranging for construction financing. (TR 105, lines 10-25, TR 106, lines 1-21)

27. Plaintiff testified that he had a discussion with Defendant about the difference in price some months before. (TR 44, lines 7-9)

28. However, on cross-examination, Plaintiff admitted that in their later discussion, Defendant characterized the difference in price as a "mistake." (TR 59, lines 15-21)

29. In fact, Plaintiff testified that at first, Defendant demanded the full $184,950. (TR 48, lines 8-17)

30. Defendant's Addendum No. 02 is perfectly consistent with this testimony: "The total selling price referenced to on the REPC for the sum of $144,950 was made in error. All other units of the like were all sold for the price of $184,950. Therefore, it becomes necessary to adjust the selling price for this unit (#402)." (Plaintiff's Exhibit 6)

31. In order to try and resolve the problem, Defendant offered to sell the unit to Plaintiff for a $5,000 discount. (TR 107, lines 9-25, TR 108, lines 1-4)

32. Plaintiff refused the offer. (TR 108, lines 5-7)

33. Defendant made the offer anyway: "I felt bad, because, you know, that I made the mistake. You know, but I was under the impression that it could have been an investment, and all I had to do, if he couldn't afford it, to give his $10,000 back." (TR 108, lines 8-14)

34. As an alternative, Defendant testified that he would be willing to sell Plaintiff a fully-built unit for $184,950. (TR 110, lines 6-8)

35. However, Defendant testified that if Plaintiff refused that, he had no choice but to cancel the REPC so he could sell the unit to someone else. (TR 110, lines 9-17)

To show that the evidence was insufficient to support the trial court's findings on this issue, Plaintiff submits that the following is all the evidence that

supports the trial court's findings, almost all of which consists of Plaintiff's uncorroborated and self-serving testimony:

1. Plaintiff testified that he first contacted Defendant about the condominium project "around Thanksgiving time, November 30th through December the 5th [2005]...." (TR 25, lines 2-10)

2. Plaintiff testified that Defendant represented the sales price for the units "[a]nywhere from the mid 100's all the way up to – well up into the 200's I believe he said." (TR 25, lines 24-25, TR 26, line 1)

3. Plaintiff testified that he expressed interest "in something on the lower end." (TR 26, lines 1-2)

4. Plaintiff testified that he wanted a unit facing east "cause that's where the mountains are." (TR 27, lines 6-8)

5. But Plaintiff testified that Defendant told him "well, something on that side you were going to be looking at 180,000's." (TR 27, lines 10-11)

6. Plaintiff testified "well, that's not something that I could afford. I need to be lower than that." (TR 28, lines 11-12)

7. Plaintiff testified that Defendant told him "he had one on the northwest corner, which faces out that way towards the lake, in my opinion, less of a view than I was for anyway, he said at $144,900." (TR 28, 12-15)

8. Plaintiff signed an Option Agreement dated January 9, 2006 for $144,950. (TR 38, lines 5-25, TR 39, lines 1-2)

9. On February 14, 2006, Plaintiff got pre-approved for a loan of $129,000. (TR 40, lines 17-25, TR 41, lines 1-13)

10. Plaintiff faxed Defendant a copy of his mortgage credit approval letter "a week or so later." (TR 42, lines 4-7)

11. At about that time, Plaintiff testified that he had a phone conversation with Defendant in which he explained that "with the building, you know, not even being – not even having started, I still have plenty of time for me to come up with the other $5,000 to $6,000." (TR 42, lines 24-25, TR 43, lines 1-2)

12. Plaintiff testified that Defendant said, "that's fine." (TR 43, line 2)

13. Plaintiff testified that in this same conversation, Defendant represented: "I've actually just sold one of the last ones similar to yours for $185,000....[S]o you're doing really well. You already have equity in it." (TR 44, lines 7-9)

14. A couple of months later, Plaintiff signed the REPC for $144,950. (TR 46, lines 5-10) (Addendum A hereto)

15. Plaintiff testified that "in early May – early or late April/early May I think it was, after two weeks – a couple of weeks after I'd sent back the [REPC]" (TR 48, lines 1-3), he had the following phone conversation with Defendant:

> [T]here's, you know, there is a problem. I sold you that condo too cheap....I can't give it to you for $144,000....Everyone else has [sic] been purchasing for $184,000, and I'm going to need to get $40,000 more from you. I'm going to have to send you a new contract for $184,000 is what he said,....
>
> TR 48, lines 8-17

16. Plaintiff testified that in that same conversation he explained to Defendant he would be unable to come up with an additional $40,000. (TR 49, lines 12-13)

17. He testified that he told Defendant "best case scenario, I'd probably be able to, you know, save $10,000 – $15,000 with the help of some friends and family." (TR 49, lines 13-15)

18. Plaintiff testified that Defendant stated: "[H]e'll see what he can do. He'll put something together and he'll fax it to me." (TR 49, lines 17-19)

19. Plaintiff testified:

> He [Defendant] said that he was going to be able to – he gave me the impression that he was going to be able to work with me. When I said that, you know, I might be able to come up with $10,000 to $15,000, he said he might be able to work with me. And he would send me a

> new agreement, but I said there was definitely no way $184,000 was going to work for me. I would have to – yeah, I wouldn't be able to purchase it. There was just no way. I wouldn't be able to save that, and I wouldn't be able to qualify for that.
>
> TR 50, lines 16-24

20. In a subsequent phone conversation, Plaintiff testified he told Defendant: "[I]f I could afford $184,000, I would have – I'd buy a house in Ogden for $184,000. I, you know, – I could get a house for that, but I didn't see myself spending $184,000 for a condo, not at the time anyway." (TR 52, lines 9-12)

STATEMENT OF FACTS

Facts relevant to the issues presented for review have been stated in the foregoing Statement of Case.

SUMMARY OF ARGUMENTS

1. The trial court confused the concepts of contract interpretation and integration. The trial court found that the REPC was only partially integrated (R. 101) when there was absolutely no dispute about it being "a fully integrated and binding agreement." (R. 132-33, ¶11) (Addendum C hereto) On this faulty basis, the trial court concluded that extrinsic evidence was needed to determine the parties' "intent." (R. 101) However, the agreed terms of the REPC were not ambiguous, and the trial court was constrained to apply those terms to the parties'

bargain. It was error for the trial court to reform the REPC, by reading out an express provision (Section 1.1), in order to make it conform to the parties' (allegedly) unstated "intent."

2. The trial court compounded its error by excluding relevant extrinsic evidence from its determination of the parties' intent. There was no question that the parties intended for conveyance of a fully-built condominium unit. However, there was a dispute about the price. The trial court excluded any evidence about price because it determined that provision to be unambiguous. However, the evidence about price was inseparable from evidence about whether the parties intended to convey a fully-built condominium unit. Therefore, the trial court ruling resulted in findings that were not supported by the evidence and clearly erroneous.

ARGUMENTS

I. THE TRIAL COURT CONFUSED THE CONCEPTS OF CONTRACT INTERPRETATION AND INTEGRATION. AS A RESULT, THE TRIAL COURT REFORMED AN UNAMBIGUOUS CONTRACT, BY READING OUT AN EXPRESS PROVISION, BECAUSE IT (ALLEGEDLY) DID NOT EXPRESS THE PARTIES' "INTENT."

The law on this subject is exceedingly clear:

> In interpreting a contract, we look to the writing itself to ascertain the parties' intentions, and we consider each contract

> provision in relation to all of the others, with a view toward giving effect to all and ignoring none.
>
> If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law....
>
> An ambiguity exists in a contract term or provision if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.
>
> *WebBank v. American General Annuity Service Corp.*, 2002 UT 88, ¶¶18-20, 54 P.3d 1139 (*citing Peterson v. Sunrider Corp.*, 2002 UT 43, ¶19, 48 P.3d 918 (quotations and other citations omitted)

A perfect example of an "ambiguous" contract is the lease in *Nielsen v. Gold's Gym*, 2003 UT 37, 78 P.3d 600. The building was under construction at the time the parties made the lease. 2003 UT 37 at ¶8 Both parties understood that the lessee intended to operate a health club and that the property would require significant interior improvements before it could be used for that purpose. *Id.* However, the lease was utterly silent on the question of who would pay for the improvements. *Id.* This was important because the cost of improvements "would

have consumed more than half the total rents...." *Id.* at ¶13 This was a case of "missing terms," *Id.* at ¶10, a clear facial deficiency.[4]

There is one well-recognized exception, which is important for perfectly expressing the trial court's considered approach to this case: "[W]e have extended the notion of ambiguity in contracts to include instances where, despite the lack of ambiguity in the terms and provisions of the contract themselves, an ambiguity exists *as to the nature and character of the contract or transaction as a whole*." *WebBank, supra*, at ¶21 (*citing Colonial Leasing Co. of New England, Inc. v. Larsen Bros. Construction Co.*, 731 P.2d 483, 487 (Utah 1986)) (emphasis added)

However, and this is critical, the exception was created for and expressly limited to a certain species of cases: "Specifically in the context of whether a particular agreement should be considered a *secured transaction* for purposes of Article 9 of the UCC,...." *WebBank, supra,* at ¶21 (emphasis added) There can be no question that the exception is strictly limited to cases involving secured transactions:

> We consider this case to be sufficiently similar to *Colonial Leasing* to be governed by it....

[4] It would be tempting to consider this case a perfect match. However, unlike this case, there was *no* extrinsic evidence on which the trial court could resolve the ambiguity. 2003 UT 37 at ¶12 Furthermore, there was no challenge to the trial court's interpretation of the contract after finding ambiguity. *Id.* at 14 Finally, the case was actually decided on a different basis: that the contract was unenforceable for lack of mutual assent, *id.*, which colored the case more than the determination of ambiguity. The cases really are quite different.

> *Colonial Leasing*, much like the case at hand, involved the issue of the interpretation of an agreement and whether the agreement, depending on its proper characterization, was a security agreement governed by Article 9 of the UCC. Our holding in *Colonial Leasing* is consistent with the general rules *for interpreting security agreements* in that, by allowing extrinsic evidence to determine the parties' intent as to whether the agreement was a security agreement, we ensured on remand that the trial court would properly focus the inquiry on the intent of the parties, on the substance, not on the mere form, of the transaction, and on the entire surrounding context of the transaction
>
> *WebBank*, *supra*, at ¶¶25-26 (citations omitted) (emphasis added)

No one has ever argued that the REPC was a secured transaction. It most certainly is not. Therefore, there was no basis for departing from the normal rules of contract interpretation in this case. However, it is important to note that even if the secured transaction analysis were employed, the Court would be required to "view all of the provisions of the contract together" in order to determine whether an ambiguity existed. *WebBank*, *supra*, at ¶28

We deem this to be perfectly consistent with what was stated above ("we consider each contract provision in relation to all of the others, with a view toward giving effect to all and ignoring none"). It also answers the trial court's second considered approach to this case: What do I do with an ambiguity? Do I not simply read out the ambiguous provision?

This question was answered by the trial court's citation *of Peterson v. Sunrider Corp.*, 2002 UT 43, 48 P.3d 918 (RR. 99-100), where the Utah Supreme court stated there is no ambiguity unless "the interpretations contended for are reasonably supported *by the language of the contract*,...." 2002 UT 43 at ¶19 (emphasis added) In this case, there was no way to square the parties' intent to convey a fully-built condominium unit with the "language" of Section 1.1, which is something the trial court seemed to accept. (R. 173, lines 22-24) This is simply another way of saying that the REPC was unambiguous.

Section 1.1 of the REPC *cannot* be read out of the contract. It must be read together with the other provisions of the contract with a view to giving it effect. In this regard, it is quite important that the REPC is a form instrument, which has been used for many years. It is not internally inconsistent. The only reason it has been deemed inconsistent in this case is because of the circumstances. It may be that the parties should have used a different form, but this is the form they used, and it is not ambiguous.

The problem with the trial court's ruling started when it considered the REPC to be less than "fully integrated." It is clear that this was the basis for the trial court's ruling:

> Accordingly, extrinsic evidence is needed to ascertain the parties' intent with respect to [whether the REPC required the conveyance of a fully-built condominium unit] only, not the contract price. *Otherwise*, the court finds that the REPC is *fully integrated* for the contract price of $144,950.
>
> R. 101 (Addendum B hereto) (emphasis added)

Hopefully, we have made exceedingly clear there was no basis for this determination. From the beginning, the parties stipulated that the REPC was "a fully integrated and binding agreement." (RR. 132-33, ¶11) (Addendum C hereto) There was never any contention that the parties were looking to something other than the REPC to memorialize their agreement. When the trial court's ruling placed this in question, the findings were modified to make it clear. (*Id.*)

Therefore, the trial court was constrained by the unambiguous terms of the REPC. In order to make the ruling that it did, it was necessary to read Section 1.1 out of the REPC. This is what the trial court meant by the following statement: "Then why don't I just reform [Section] 1.1 to say in this case that the parties *intended* to have a built-out unit." (TR 173, lines 22-24) (emphasis added) There was an explicit understanding that the parties' contract did not provide for a "built-out unit."

However, this did violence to another principle of contract interpretation: Parol evidence may be admissible to "clarify" a facial ambiguity, but it is inadmissible "to *vary* or *contradict* the clear and unambiguous terms of an integrated contract,...." *Union Bank v. Swenson*, *supra*, 707 P.2d at 665 (emphasis added) Therefore, the trial court's ruling was impermissible even under its wrongful finding of partial integration.

It is obvious that the trial court did not like the parties' agreement. (No one did.) However, the trial court was without legal authority to reform the instrument. It was the "final and complete expression of [the parties'] bargain." *Eie v. St. Benedict's Hospital*, 638 P.2d 1190, 1194 (Utah 1981) (quotation omitted) Therefore, the trial court should not have considered whether it correctly stated the parties' "intent." Parol evidence would have been admissible to "clarify" a facial ambiguity, *Union Bank v. Swenson*, *supra*, but it was not admissible to create an ambiguity where one did not exist. Either way, it was error for the trial court to read the (allegedly) offending provision out of the contract. The parties made the contract that they did, and they are required to live with it even if it does not perfectly express their (subjective) intent.

II. HAVING CONCLUDED THAT THE REPC WAS "AMBIGUOUS," THE TRIAL COURT DISREGARDED RELEVANT EVIDENCE ABOUT THE PARTIES' INTENT. AS A RESULT, THE TRIAL COURT RULING RESULTED IN FINDINGS THAT WERE NOT SUPPORTED BY THE EVIDENCE AND CLEARLY ERRONEOUS.

The trial court ruling was the product of a flawed legal analysis. However, it was also the product of a rigid and overly formalistic approach to the evidence. Once the trial court concluded that Section 1.1 was ambiguous, it disregarded any evidence that did not go to the question whether the parties intended for the conveyance of a fully-built condominium unit. There is no question that the parties – subjectively – intended for conveyance of a fully-built unit. But the trial court disregarded relevant evidence that the parties intended for conveyance of a fully-built unit, for the agreed price of $184,950. Therefore, the trial court ruling resulted in findings that were not supported by the evidence and clearly erroneous.

It is unclear whether the trial court accepted Plaintiff's version of the events. The trial court merely stated that "Flores' testimony concerning the interpretation of the contract for a built-out unit appears *reasonable*." (TR 101) (emphasis added) It is obvious this statement was made for the purpose of satisfying the legal requirement "that the interpretations contended for are *reasonably* supported by the language of the contract,...." *Peterson v. Sunrider Corp.*, 2002 UT 43 at ¶19 (emphasis added)

However, Plaintiff's version of the events made their way into the trial court's "Findings of Fact" (R. 129) (Addendum C hereto), which supported the Order and Judgment that is appealed from in this case. (R. 139) Therefore, it is necessary to examine the evidence underlying the findings to see if it is legally sufficient.

The trial court found that "Earnshaw offered to sell Flores a small two-bedroom condominium in the northwest corner of the proposed Earnshaw Building for a purchase price of $144,950.00." (R. 130, ¶5) This statement is true enough because the $144,950 price found its way into the Option Agreement that was signed by the parties. (Plaintiff's Exhibit 1) However, it implies that Earnshaw *intended* to convey a fully-built condominium unit for $144,950, which is where the wheels fall off.

The only evidence of this supposed intent was Plaintiff's unsupported and self-serving testimony, which was contradicted by Defendant. Plaintiff's testimony was also contradicted by material and undisputed evidence that Plaintiff was not the first person to buy one of the small-sized units, and each and every one of those units was sold for a minimum of $184,950. In fact, there was no evidence that Defendant offered a discount of the stated price for any of the units, even the

larger units. This is to say nothing of the fact that Defendant's Internet marketing clearly stated: "Unit prices start at $184,950."

Plaintiff had the trial court believe that Defendant made a $40,000 exception in Plaintiff's case. However, there was never a good explanation for why Defendant would do this that was supported by competent evidence.

Plaintiff has suggested (and is expected to argue) that he was one of the first purchasers of Defendant's development and that Defendant simply made an error in judgment about the marketability of the project. Plaintiff testified to a conversation with Defendant after the Option Agreement was signed, where Defendant is alleged to have stated: "I've actually just sold one of the last ones similar to yours for $185,000....[S]o you're doing really well. You already have equity in it." (TR 44, lines 7-9) However, it was proven that Plaintiff was not the first purchaser of a small-sized unit, and that purchaser paid the same $184,950. (TR 125, lines 18-25, TR 126, lines 1-19)

Plaintiff has also argued that his northwest-facing unit was worth less than an east-facing unit. (TR 27, lines 6-11) However, we demonstrated at trial that Defendant sold a unit immediately below Plaintiff for the same $184,950. (TR 95, lines 13-23) Finally, it is a minor point, but $185,000 is more than $184,950. If Defendant made the statement attributed to him by Plaintiff, it could be he was

referring to this small increase in price. No matter what, if Plaintiff were right about Defendant's alleged error in judgment, we could understand a difference of $5-10,000, but $40,000?

Plaintiff's story does not hold up under close examination. The phone conversation referenced above occurred in "early March." (TR 43, lines 5-10) This was after the parties signed the Option Agreement, but before the parties signed the REPC. According to Plaintiff, there was "a discussion about price, and how [Plaintiff was] going to make up the difference and the time frame;...." (TR 43, lines 14-20) Plaintiff characterized Defendant as "very upbeat about it. He said everything was going really well. I've had a lot of interest from across – he mentioned across the country. People have been interested in these condos, and he said I've actually just sold one of the *last ones* similar to yours for $185,000. And he goes, so you're doing really well. You already have equity in it." (TR 44, lines 3-9) (emphasis added) Plaintiff could not explain why Defendant would be "excited" about dropping more than $40,000 in the sale to Plaintiff. (TR 57, line 25, TR 58, lines 1-17) However, the point is what came later.

Plaintiff testified to a phone conversation with Defendant "in early May – early or late April/early May,"[5] which was after the REPC was signed: "He [Defendant] called me, and he said that there's, you know, there is a problem. I sold you that condo too cheap. He goes, I can't give it to you for $144,000." (TR 48, lines 8-10) "He said, you know, some of the words that came out of his mouth were to the effect that he's got people lined up wanting to buy these condos. They're in such high demand, and he sold other ones for $184,000." (TR 59, lines 5-14) However, this does not explain why Defendant came to this realization some months after the fact. Remember, Plaintiff testified to a conversation with Defendant in "early March," where Defendant is alleged to have represented that he sold "one of the *last* [units] similar to yours [Plaintiff] for $185,000." (TR 44, lines 7-8) (emphasis added)

Defendant did *not* come to this realization some months after the fact. It is evident he did not discover the problem until some months after the fact, which is how he testified. This means that Defendant truly intended to sell the unit for $184,950. If this is the case, then the trial court's findings are clearly erroneous. All the more so because the issue of price did not factor into the trial court's ruling. If it had, the trial court could have enforced the parties' agreement without doing

[5] TR 47, line 1, TR 48, lines 1-3).

such violence to their contract. However, this option was foreclosed by the trial court's decision to disregard evidence of price. As a result, the trial court ruling must be reversed even if this Court agrees that the REPC was "ambiguous."

CONCLUSION

Defendant's counsel made the following opening statement at trial:

> There's two ways, I think, to look at this case. Two possible results, okay? The first is the unfortunate one. The stripped, legal language of this contract, despite what both of these guys say was their intent because apparently that contract does not reflect either one of their intents, and that's a fact. A, Mr. Flores, wants a built-out unit. It doesn't say he gets that. B, Mr. Earnshaw says I'm supposed to get $184,000. It doesn't say that. It says $144,000 for the shell, okay? And that is one possibility.
>
> The other is to accept the extrinsic evidence. And at the end of the day, conclude, if you believe that's permissible that the language of the contract, 1.1, even though I don't see it, was ambiguous, but it's fairly apparent from all of the relevant circumstances, the fact that everybody else paid $184,000 – that there were no discounts, and all of this evidence is before you – that that was the right price. That was the party's [sic] intent. Like I said, I don't know how to make that round peg go into that square hole, but that would be a way to achieve substantial fairness, but I think those are the only two permissible results in this unfortunate case consistent with the law that we have to follow.
>
> TR 22, lines 10-25, TR 23, lines 1-7

We still think those are the only legally permissible ways to resolve this case. However, the trial court rejected both of them to Defendant's disadvantage.

Therefore, this Court is left with no choice but to reverse the trial court on both counts.

For the foregoing reasons, the trial court's Memorandum Decision (R. 095) should be REVERSED and the Order and Judgment (R. 139) VACATED.

DATED this 24th day of July, 2008.

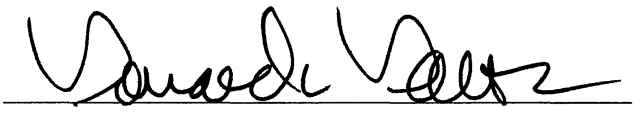
DALTON & KELLEY, PLC

By _____
Donald L. Dalton
Attorneys for Appellant

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that true and correct copies of the within and foregoing "Brief of Appellant" were mailed, First Class, postage prepaid, this 25th day of July, 2008, to:

Michael F. Olmstead
Attorney for Plaintiff
2650 Washington Blvd., Suite 102
Ogden UT 84401



ADDENDUM A

REAL ESTATE PURCHASE CONTRACT

This is a legally binding contract. Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

Buyer Seadhna J. Flores offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of $ 10,000.00 in the form of CASH which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.
Received by: DAVID G. EARNSHAW on April 14, 2006 (Date)
(Signature of agent/broker acknowledges receipt of Earnest Money)
Brokerage: _____ Phone Number _____

OFFER TO PURCHASE

1. **PROPERTY:** Lot No. 05 of Ogden Downtown Entertainment Center
also described as: 339 East 2550 South Unit No. 402
City of Ogden County of Weber State of Utah, Zip 84401 (the "Property").

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently owned and attached to the Property: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna; satellite dishes and system; permanently affixed carpets; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: None

1.2 Excluded Items. The following items are excluded from this sale: _____

1.3 Water Rights. The following water rights are included in this sale: None

1.4 Survey. (Check applicable boxes): A survey [ ] WILL [X] WILL NOT be prepared by a licensed surveyor. The Survey work will be [ ] Property corners staked [ ] Boundary Survey [X] Boundary & Improvements survey [ ] Other (specify) None . Responsibility for payment: [X] Buyer [ ] Seller [ ] Buyer and Seller share equally. Buyer's obligation to purchase under this Contract [ ] IS [X] IS NOT conditioned upon Buyer's approval of the Survey Work. If yes, the terms of the attached Survey Addendum apply.

2. **PURCHASE PRICE.** The Purchase Price for the Property is $ 144,950.00

2.1 Method of Payment. The Purchase Price will be paid as follows:

$ 10,000.00 **(a) Earnest Money Deposit. Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.**

$ _____ **(b) New Loan.** Buyer agrees to apply for a new loan as provided in Section 2.3. Buyer will apply r one or more of the following loans: **[X] CONVENTIONAL [ ] FHA [ ] VA [ ] OTHER** (specify) _____
If an FHA/VA loan applies, see attached FHA/VA Loan Addendum.
If the loan is to include any particular terms, then check below and give details:
[X] SPECIFIC LOAN TERMS None

$ _____ **(c) Loan Assumption Addendum** (See attached Assumption Addendum if applicable)

$ N/A **(d) Seller Financing** (see attached Seller Financing Addendum if applicable)

$ _____ **(e) Other** (specify) _____

$ 134,950.00 **(f) Balance of Purchase Price in Cash at Settlement**

$ 144,950.00 **PURCHASE PRICE. Total of lines (a) through (f)**

2.2 Financing Condition. (check applicable box)

 Seller's Initials _____ Date 5/10/06 Buyer's Initials _____ Date 4/21/06

(a) [ ] Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicableloan(s) referenced in n Section 2.1(b) or (c) (the "Loan"). This condition is referred to as the "Financing Condition."

(b) [X] Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.

2.3 Application for Loan.

(a) Buyer's duties. No later than the Loan Application & Fee Deadline referenced in Section 24(a), Buyer shall apply for the Loan. "Loan Application" occurs only when Buyer has: (i) completed, signed, and delivered to the lender (the "Lender") the initial loan application and documentation required by the Lender; and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) Procedure if Loan Application is denied. If Buyer receives written notice from the Lender that the Lender does not approve the Loan (a "Notice of Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b): (i) if the Notice of Loan Denial was received by Buyer no later than the Loan Denial Deadline referenced in Section 24(d), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Loan Denial was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(a). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

2.4 Appraisal Condition. Buyer's obligation to purchase the Property [ ] **IS** [X] **IS NOT** conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition". If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property as appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel this Contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice. In the event of a cancellation under this Section 2.4: (i) if the Notice of Appraised Value was received by Buyer no later than the Appraisal Deadline referenced in Section 24(e), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Appraised Value was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the Appraisal Condition by Buyer. Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

3. SETTLEMENT AND CLOSING.

Settlement shall take place on the Settlement Deadline referenced in Section 24(f), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyershall each pay one-half (½) of thefee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(f), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed withinfour calendar days of Settlement.

4. POSSESSION. Seller shall deliver physical possession to Buyer within: [0] ____hours [0] _____days after Closing;

 Seller's Initials DEE Date 5/4/06 Buyer's Initials ____ Date 4/21/06

[X] Other (specify) Funding

5. **CONFIRMATION OF AGENCY DISCLOSURE.** At the signing of this Contract:
[ ] Seller's Initials [ ] Buyer's Initials

The Listing Agent, None, represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;
The Listing Broker, None, represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

The Selling Agent, None, represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;
The Selling Broker, None, represents [ ] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent

6. **TITLE INSURANCE.** At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

7. **SELLER DISCLOSURES.** No later than the Seller Disclosure Deadline referenced in Section 24(b), Seller shall provide to Buyer the following documents which are collectively referred to as the "Seller Disclosures":

(a) a Seller property condition disclosure for the Property, signed and dated by Seller;
(b)a commitment for the policy of title insurance;
(c) a copy of any leases affecting the Property not expiring prior to Closing;
(d) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
(e) Other (specify) _____

8. **BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS.** Buyer's obligation to purchase under this Contract **(check applicable boxes):**

(a) [X] IS [ ] IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
(b) [X] IS [ ] IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
(c) [ ] IS [ ] IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor ("Survey");
(d) [ ] IS [ ] IS NOT conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;
(e) [ ] IS [ ] IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify)

If any of the above items are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations & Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walkthrough inspection under Section 11.

8.1 Evaluations & Inspections Deadline. No later than the Evaluations & Inspections Deadline referenced in Section 24(c) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

 Seller's Initials _____ Date 5/a/06 Buyer's Initials _____ Date 4/21/06

8.2 Right to Cancel or Object. If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 Failure to Respond. If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

8.4 Response by Seller. If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

9. ADDITIONAL TERMS. There [X] ARE [ ] ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: **[X] Addendum No. 01 [ ] Seller Financing Addendum [ ] FHA/VA Loan Addendum [ ] Assumption Addendum [ ] Lead-Based Paint Disclosure & Acknowledgement (in some transactions this disclosure is required by law) [ ] Lead-Based Paint Addendum (in some transactions this addendum is required by law) [ ] Other** (specify)_____

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10. SELLER WARRANTIES & REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

10.2 Condition of Property. Seller warrants that the Property will be in the following condition **ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:**

(a) the Property shall be broom-clean and free of debris and personal belongings. Any Seller or tenant moving-related damage to the Property shall be repaired at Seller's expense;

(b) the heating, cooling, electrical, plumbing and sprinkler systems and fixtures, and the appliances and fireplaces will be in working order and fit for their intended purposes;

(c) the roof and foundation shall be free of leaks known to Seller;

(d) any private well or septic tank serving the Property shall have applicable permits, and shall be in working order and fit for its intended purpose; and

(e) the Property and improvements, including the landscaping, will be in the same general condition as they were on the date of Acceptance.

10.3 Home Warranty Plan. The "Home Warranty Plan" referenced in this Section 10.3 is separate from the warranties provided by Seller under Sections 10.1 and 10.2 above. **(Check applicable boxes):** A one-year Home Warranty Plan [ ] **WILL** [ ] **WILL NOT** be included in this transaction. If included, the Home Warranty Plan shall be ordered by [] **Buyer** [ ] **Seller** and shall be issued by a company selected by [ ] **Buyer** [ ] **Seller.** The cost of the Home Warranty Plan shall not exceed $_____ and shall be paid for at Settlement by [ ] **Buyer** [ ] **Seller.**

11. WALK-THROUGH INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a "walk-through" inspection of the Property to determine only that the Property is "as represented," meaning that

the items referenced in Sections 1.1, 8.4 and 10.2 ("the items") are respectively present, repaired/changed as agreed, and in the warranted condition. If the items are not as represented, Seller will, prior to Settlement, replace, correct or repair the items or, with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement to provide for the same. The failure to conduct a walk-through inspection, or to claim that an item is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items as represented.

12. CHANGES DURING TRANSACTION. Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances to the Property shall be made.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company, or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. COMPLETE CONTRACT. This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract **(check applicable box)**

[ ] SHALL

[ ] MAY AT THE OPTION OF THE PARTIES

first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

16. DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.3(b).

17. ATTORNEY FEES AND COSTS. In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participationn mediation under Section 15.

18. NOTICES. Except as provided in Section 23, all notices required under this Contract must be: (a) in writing; (b) signedby the party giving notice; and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

19. ABROGATION. Except for the provisions of Sections 10.1, 10.2, 15 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. RISK OF LOSS. All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

21. TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this Contract. Extensions must be

agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Sectionof this Contract which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date; and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (i.e., Acceptance, Notice of Loan Denial, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

22. FAX TRANSMISSION AND COUNTERPARTS. Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counteroffers may be executed in counterparts.

23. ACCEPTANCE. "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

24. CONTRACT DEADLINES. Buyer and Seller agree that the following deadlines shall apply to this Contract:

(a) Loan Application & Fee Deadline _____ (Date)

(b) Seller Disclosure Deadline _____ (Date)

(c) Evaluations & Inspections Deadline _____ (Date)

(d) Loan Denial Deadline _____ (Date)

(e) Appraisal Deadline _____ (Date)

(f) Settlement Deadline _____ (Date)

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 5:00 [ ] AM [X] PM Mountain Time on April 14, 2006 (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

(Buyer's Signature)	4/21/06 (Offer Date)	(Buyer's Signature)	(Offer Date)

The later of the above Offer Dates shall be referred to as the "Offer Reference Date"

SERAFINA FLORES	334 Century Dr Oswego IL	60543	
(Buyers' Names) (PLEASE PRINT)	(Notice Address)	(Zip Code)	(Phone)

 Seller's Initials _____ Date 5/01/06 Buyer's Initials _____ Date 4/21/06

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

[X] **ACCEPTANCE OF OFFER TO PURCHASE:** Seller Accepts the foregoing offer on the terms and conditions specified above.

[X] **COUNTEROFFER:** Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. 01.

April 14, 2006 8:45 A.M.

(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

David G. Earnshaw 1774 Earnshaw Ln. Salt Lake City, UT 84116 801-898-5542

(Sellers' Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

[ ] **REJECTION:** Seller Rejects the foregoing offer.

(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

****

DOCUMENT RECEIPT

State law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures. (Fill in applicable section below.)

A. I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures:

4/21/06

Buyer's Signature) (Date) (Buyer's Signature) (Date)

5/1/06

Seller's Signature) (Date) (Seller's Signature) (Date)

B. I personally caused a final copy of the foregoing Contract bearing all signatures to be [ ] faxed [ ] mailed [ ] hand delivered on _____ (Date), postage prepaid, to the [ ] Seller [ ] Buyer.
Sent/Delivered by (specify) _____

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

 Seller's Initials _____ Date 5/1/06 Buyer's Initials _____ Date 4/21/06

ADDENDUM B

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

Seadhna J. Flores, Plaintiff, vs. David G. Earnshaw, Defendant.	Memorandum Decision Judge Michael D. Lyon Case No. 060905957

Plaintiff Seadhna J. Flores ("Flores") seeks specific performance under a Real Estate Purchase Contract ("REPC"), compelling Defendant David G. Earnshaw ("Earnshaw") to sell to him a condominium for the contract price of $144,950.

Trial occurred on September 21, 2007. Following an opportunity to submit post-trial memoranda, counsel submitted their memoranda to the court on October 5 and 9, 2007, and the matter for decision.

The issues before the court are (1) whether the contract, as written, is for a condominium "shell," namely, a unit not built out with electricity, plumbing, fixtures, or improvements of any kind for the purchase price of $144,950; (2) whether the court should admit extrinsic evidence in interpreting the parties' contract; and, if so, (3) whether Flores is entitled to a built-out unit for $144,950; or (4) whether he is entitled to a built-out unit for an increased price of $184,950.

Having considered counsels' pre- and post-trial memoranda and the trial evidence, the court finds and rules in favor of Flores, that he is entitled to a built-out unit for the contract price

of $144,950.

BACKGROUND

In recent years, Ogden City razed the Ogden City Mall that was situated north and south between 22nd and 24th Streets and east and west between Washington Boulevard and Grant Avenue in Ogden City. In place of the mall, the city has been selling the real estate for the development of a large entertainment center, office buildings, retail businesses, and residential units. Earnshaw proposed to Ogden City the construction of the Earnshaw Building, a six-story building, consisting of offices on the main floor and residential condominium units on the remaining floors. In anticipation of approval of the Earnshaw Building, Earnshaw began advertising the sale of the residential condominium units on the Internet and by a large sign on the side of a semi-trailer parked on the proposed site.

Flores expressed interest in buying a condominium to Earnshaw in December 2005. Following several negotiations in late December, Earnshaw offered to sell to Flores a small, two-bedroom condominium in the northwest corner of the proposed Earnshaw Building for the purchase price of $144,950. In doing so, Earnshaw assured Flores that the proposed unit would be finished in a "high standard—carpet, tile, cabinets."

On January 9, 2006, Earnshaw sent to Flores by fax an option agreement for Flores to purchase the condominium for $144,950. The option agreement preceded the real estate purchase contract because, as of January 2006, Earnshaw had not yet finalized his purchase of the real estate from Ogden City on which to build his building. In order for Flores to exercise the option, thus reserving the unit he had selected, the option agreement required him to remit $10,000 to

Earnshaw, which would eventually be applied to the purchase price. Flores timely accepted the option and remitted the required deposit.

After Earnshaw closed on the real estate with Ogden City in March 2006, he forwarded to Flores on April 9, 2006, a real estate purchase contract ("REPC") for the sale and purchase of the condominium, described in the agreement as "Lot no. 5 of Ogden Downtown Entertainment Center, 339 East 2550 South, Unit no. 402." Under the financial terms of the agreement, Flores agreed to pay Earnshaw $144,950, less the $10,000 previously paid when Flores exercised the option. Flores accepted the offer on April 21, 2006, and Earnshaw signed the REPC on May 1, 2006, thus creating a binding agreement.

In early May 2006, Earnshaw called Flores, indicating that he had sold the condominium too cheaply. Earnshaw represented that he had sold all of the units in the building, that all other buyers of similarly-sized units had paid $184,950, and that he could not afford to sell the one to Flores for less.

Earnshaw later sent a faxed addendum to the REPC to Flores to correct the purchase price. The addendum states: "The total selling price referenced to on the REPC for the sum of *$144,950 was made in error.* All other units of the like were sold for the price of $184,950. Therefore, it becomes necessary to adjust the selling price for this unit (#402)." (Pl.'s Ex. 6 (emphasis added).) Earnshaw further stated in the addendum that the purchase price shall be $179,950, less the $10,000 deposit as earnest money to be applied at closing. Earnshaw then gave Flores 12 days to accept the addendum or forfeit his deposit, at which time Earnshaw would consider their agreement void.

At trial, Earnshaw contended that, contrary to Flores' testimony, the parties always discussed a purchase price of $184,950. He stated that he had either made a scrivener's error or his secretary had made an error in reading his hand-written notes as she prepared the option agreement. Later, when he closed on the property with Ogden City in March 2006, Earnshaw directed his secretary to prepare the REPC using the purchase price reflected in the option agreement because the purchase price varied, depending on the size and location of the unit in the building. Thus, Earnshaw maintains that his secretary perpetuated an error from the option agreement to the REPC, which he never saw in either document until later in May 2006.

Earnshaw testified that he intended to provide a fully built-out condominium unit to Flores, but only for $184,950. Nonetheless, since Flores seeks to enforce the price of $144,950, as written in the contract, then Earnshaw, too, seeks to enforce the express terms of the REPC. Earnshaw contends that paragraph 1.1, as written, requires him to build only a "shell" for Flores because, unless such things as electricity, plumbing, fixtures, etc., were attached to the property when the parties executed their agreement, they are not included in the purchase price. Paragraph 1.1 reads as follows:

> Included Items. Unless excluded herein, this sale includes the following items *if presently owned and attached to the Property*: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna; satellite dishes and system; permanently affixed carpets; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also included in this sale and conveyed under separate Bill of Sale with warranties as to title: None.

(Pl.'s Ex. 4 ¶ 1.1 (emphasis added).)

The facts are undisputed that, at the time the parties contracted, none of the items referenced in paragraph 1.1 could have been attached to the property because neither unit no. 402 existed or Earnshaw's condominium building had been built. Nonetheless, Earnshaw stands willing to provide to Flores the "features" of a built-out unit, contained in Earnshaw's marketing materials but not referenced in the REPC, if Flores will pay the $184,950 that others are paying.

On July 3, 2006, Flores filed a notice of a claim of interest against the property. In response, Earnshaw demanded on July 20, 2006, that the notice of claim be withdrawn as a wrongful lien under Utah Code Ann. § 38-9-1(6). Flores released his claim of interest on August 24, 2006, but recorded a notice of lis pendens on October 19, 2006, after filing his complaint. On December 14, 2006, the notice of lis pendens was subordinated to a lien from First Community Bank trust deed. On February 15, 2007, Earnshaw requested that the lis pendens be released. Flores refused on February 21, 2007. Later Earnshaw filed an answer to Flores' complaint and a counterclaim for wrongful lien.

ANALYSIS

I. Real Estate Purchase Contract

The intention of the parties to the contract is controlling in construing the REPC. Normally, "[i]f the language of the contract is unambiguous, the intention of the parties may be determined as a matter of law based on the language of the agreement. . . . A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms or other facial deficiencies.' In determining whether a contract

is ambiguous[,] the court is not bound to consider only the language of the contract. 'Any relevant evidence must be considered' so that the court 'can place itself in the same situation the parties found themselves at the time of contracting. The only evidence relevant to that inquiry is evidence of the facts known to the parties at the time they entered the [agreement].'" *Peterson v. Sunrider Corp.*, 48 P.3d 918, 925 (Utah 2002) (citations omitted).

The *Peterson* court went on to say, "If after considering such evidence the court determines that the interpretations contended for are reasonably supported by the language of the contract, then extrinsic evidence is admissible to clarify the ambiguous terms. Conversely, if after considering such evidence, the court determines that the language of the contract is not ambiguous, then the parties' intentions must be determined solely from the language of the contract." *Id.* (quoting *Ward v. Intermountain Farmers Ass'n,* 907 P.2d 264, 268 (Utah 1995)).

"Questions of whether a contract is ambiguous because of uncertain meaning of terms, missing terms, or facial deficiencies are questions of law that must be determined by the court before parol or extrinsic evidence may be admitted to clarify the contractual intent of the parties. Questions of intent as determined by extrinsic evidence are questions of fact to be decided by the trier of fact . . . ." *Fitzgerald v. Corbett*, 793 P.2d 356, 358 (Utah 1990).

In this case, Earnshaw used a REPC that is normally used in the sale and purchase of an *existing* piece of improved real estate. Hence, a provision defining items included in the sale "if presently owned and attached to the property" clarifies what is usually included in the sale. However, Earnshaw used a REPC when no physical structure or improved real estate existed. In fact, no discernible street address, as referenced in paragraph 1, even existed except, perhaps, in a

plat in the county recorder's office. Therefore, placing the parties in the position they found themselves when they executed the contract, the court concludes that paragraph 1.1, referencing items included in the sale of the property "if presently owned and attached to the property," creates an uncertain meaning of the parties' intent, a facial deficiency, and an impression that other terms are missing. Moreover, Flores' testimony concerning the interpretation of the contract for a built-out unit appears reasonable. Accordingly, the court concludes that the contract is ambiguous about the extent to which the condominium unit no. 402 would be built out. Accordingly, extrinsic evidence is needed to ascertain the parties' intent with respect to that issue only, not the contract price. Otherwise, the court finds that the REPC is fully integrated for the contract price of $144,950.

Having concluded that the contract is ambiguous and extrinsic evidence is admissible to determine the parties' intent to which unit no. 402 would be built, the court finds, based on the parties' testimonies, that there is no dispute that both parties intended a built-out unit.

In summary of this point, Earnshaw shall build out Flores' condominium, Unit no. 402, according to Earnshaw's marketing materials that includes a "features" page. In making this order, the court is cognizant that Flores was uncertain of whether the "features" page was part of Earnshaw's Internet advertising when he evaluated Earnshaw's offer to the public and signed the REPC. The court finds later, at the direction of his lawyer in May 2006, Flores made a copy of Earnshaw's Web-page advertising that did include a features page. Since Earnshaw sold all the condominium units within less than 30 days in January 2006, is seems reasonable for the court to find, and it so finds, that all buyers, including Flores, relied on the features page of Earnshaw's

marketing materials in purchasing their condominium units. Moreover, Earnshaw never denied that the features page was part of his web page from the inception of his advertising. Nonetheless, if, on appeal, the court of appeals concludes that the trial court has indulged in impermissible speculation in making the foregoing finding, then, alternatively, Earnshaw shall build out Unit no. 402 commensurate with the features and amenities of other similarly-sized units in the building because Earnshaw promised a "fully built unit" of "high standard—carpet, tile, cabinets," unless the buyers of similarly-sized units negotiated above the purchase price of $184,950 for upgrades in features, fixtures, or other amenities.

II. Lis Pendens

Following Earnshaw's demand for more money after discovering his error in the REPC, Flores filed a notice of a claim of interest against the property. In response, Earnshaw demanded that the notice of claim be withdrawn as a wrongful lien under Utah Code Ann. § 38-9-1(6). Complying, Flores released his claim of interest but filed suit for specific performance of the contract and recorded a notice of lis pendens on October 19, 2006. On February 15, 2007, Earnshaw requested that the lis pendens be released, but Flores refused.

In his counterclaim, Earnshaw asserts that Flores' lis pendens is a wrongful lien under Utah Code Ann. § 38-9-1(6). Flores contends, however, that § 38-9-2(2) authorizes an exemption to the Wrongful Lien Act for a lis pendens: "The provisions of this chapter shall not prevent a person from filing a lis pendens in accordance with Section 78-40-2 or seeking any other relief permitted by law." Section 78-40-2 provides: "In any action affecting the title to, or the right of possession of, real property the plaintiff . . . may file for record with the recorder of the county in

which the property . . . is situated a notice of the pendency of the action . . . ." Utah Code Ann. § 78-40-2.

Repudiating Flores' claim of exemption, Earnshaw argues that "this action does not affect the title to, or the right of possession of, real property." In support of his argument, Earnshaw offers as authority *Russell v. Thomas*, 999 P.2d 1244 (Utah Ct. App. 2002), which he contends stands for the proposition "that a real estate purchase contract is nothing more than an agreement that the owner will grant to the buyer an interest in real property at some future time. In other words, such an agreement 'does not purport to convey an interest in land, but is nothing more than a promise to do so at a later time.'" (Def.'s Supplemental Trial Br. p. 10 (quoting *Russell*, 999 P.2d at 1248).)

Earnshaw misapprehends the analysis and holding of *Russell*. That case involved a purchase and development agreement, which by its terms, the "defendants [the party filing the notice of lis pendens] did not have an interest in land, but an agreement that plaintiffs will grant to defendants an interest in [the subject property] at some future time." *Id.* In *Russell*, the defendants argued that they had at least an equitable interest in [the property], similar to a buyer's interest in a real estate purchase contract. Rejecting this argument, the court of appeals said: "*[T]he Agreement here is not analogous to a real estate contract* in that the Agreement does not purport to convey an interest in property, but contains a *qualified* promise to do so at a later time. Once parties have entered into a binding and enforceable land sale contract, the buyer's interest in the contract is said to be real property and the seller's retained interest is characterized as personal property. Accordingly, we reject this argument." *Id.* (citations omitted) (emphasis

added).

The court holds in this case that the REPC is an executory contract for the sale and purchase of real property, in which Flores has an equitable interest in the real property under the doctrine of equitable conversion. "Under the doctrine of equitable conversion, once parties have entered into a binding and enforceable land sale contract, the buyer's interest in the contract is said to be real property and the seller's retained interest is characterized as personal property." *Cannefax v. Clement,* 786 P.2d 1377, 1379 (Utah Ct. App. 1990). Continuing its analysis, the court of appeals in *Cannefax* relied on *Butler v. Wilkinson*, 740 P.2d 1244 (Utah 1987), where Justice Stewart stated: "Under the doctrine of equitable conversion, a vendee under a uniform real estate contract obtains an equitable interest in the land itself, even though the vendor retains the legal title. The vendee is said to convert the monetary interest that he has in the property to an interest in real estate so that he may invoke the powers of an equity court to compel specific performance of the real estate contract." *Butler*, 740 P.2d at 1255 n.5. The court further said in *Butler*, "as a general proposition, the vendee is treated as the owner of the land." *Id.* at 1254.

Therefore, because Flores has an equitable interest in the condominium unit no. 402, under his REPC, he had authority under section 78-40-2 to file a lis pendens as part of "an action affecting the title to, or the right of possession of, [the] real property" to give constructive notice to other potential buyers of his *property* interest.

CONCLUSION

Flores is entitled to an judgment of specific performance, ordering Earnshaw to build out Flores' condominium, Unit no. 402, consistent with the marketing materials used to sell the

condominium units in the Earnshaw Building. He shall build out the unit commensurate with the features and amenities of other similarly-sized units in the building, unless the buyers of those units negotiated above the purchase price of $184,950 for upgrades.

Flores is entitled to a judgment dismissing Earnshaw's counterclaim of a wrongful lien. Flores validly filed a notice of lis pendens.

Under paragraph 17 of the REPC, Flores is entitled to reasonable attorney fees and costs as the prevailing party. He may also have reasonable attorney fees for his successful defense of Earnshaw's claim of a wrongful lien, pursuant to Utah Code Ann. § 38-9-7(5)(c). Mr. Olmstead may submit to Mr. Dalton an affidavit for fees and a memorandum of costs. Mr. Dalton has 10 days after service to object. In case of an objection, the court will reopen this case for an evidentiary hearing to address fees and costs.

Dated this 24 day of October, 2007.

Michael D. Lyon, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 25 day of October, 2007, I sent a true and correct copy of the foregoing ruling to counsel as follows:

Michael F. Olmstead
Attorney for Plaintiff
2650 Washington, Blvd., Suite 102
Ogden, Utah 84401

Donald L. Dalton
Attorney for Defendant
Post Office Box 58084
Salt Lake City, Utah 84158

Deputy Court Clerk

ADDENDUM C

MICHAEL F. OLMSTEAD [2455]
Attorney for Plaintiff
2650 Washington Boulevard, Suite 102
Ogden, Utah 84401
Telephone (801) 625-0960
Facsimile (801) 621-0035

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

SEADHNA J. FLORES, Plaintiff, vs. DAVID G. EARNSHAW, Defendant.	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 060905957 *Judge* MICHAEL D. LYON

This matter having come on for a Bench Trial this 21st day of September, 2007, before the Honorable MICHAEL D. LYON, District Court Judge; and the Plaintiff appearing in person and with his counsel of record, MICHAEL F. OLMSTEAD, Esquire; and the Defendant appearing in person and with his counsel of record, DONALD L. DALTON, Esquire; and both parties having testified in support of their cause; and both sides having submitted various exhibits in support of their cause; and each party, through their counsel of record, having made oral arguments to the Court at the close of evidence; and each party, through their respective counsel, having submitted Post-Trial Memoranda at the request of the Court; and the Court having considered the matter; and, being

duly advised, hereby enters the following Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. In recent years, Ogden City razed the Ogden City Mall that was situated north and south between 22nd and 24th Streets and east and west between Washington Boulevard and Grant Avenue in Ogden City.

2. In place of the mall, the city had been selling real estate for the development of a large entertainment center, office buildings, retail business and residential units.

3. Defendant DAVID G. EARNSHAW ("Earnshaw") proposed to Ogden City and was approved for the construction of the Earnshaw Building, a six-story development consisting of offices on the main floor and residential condominium units on the remaining floors.

4. In anticipation of approval of the Earnshaw Building, Earnshaw began advertising for the sale of residential condominium units, by way of the Internet and by a large sign on the side of a semi-trailer parked on the proposed site.

5. Plaintiff SEADHNA J. FLORES ("Flores") expressed interest in buying a condominium in a conversation with Earnshaw in December 2005 and, following several negotiations thereafter in late December, Earnshaw offered to sell Flores a small two-bedroom condominium in the northwest corner of the proposed Earnshaw Building for a purchase price of $144,950.00. In doing so, Earnshaw assured Flores that the proposed unit would be finished in a

"high standard - carpet, tile, cabinets".

6. On January 9, 2006, Earnshaw sent to Flores, by fax, an Option Agreement for Flores to purchase the condominium for the purchase price of $144,950.00. This agreement preceded a later Real Estate Purchase Contract because, as of January 2006, Earnshaw had not yet finalized his acquisition of the real estate from Ogden City on which to build his building.

7. In order for Flores to exercise this option, thus reserving the unit he had selected, the Option Agreement required him to remit $10,000.00 to Earnshaw, which deposit would eventually be applied against the purchase price.

8. Flores timely accepted the terms of the Option Agreement by executing the same and remitted to Earnshaw the required deposit.

9. After Earnshaw closed on the real estate with Ogden City in March 2006, he forwarded to Flores, on April 9, 2006, a Real Estate Purchase Contract ("REPC") for the sale and purchase of a residential condominium unit, described in the agreement as "Lot No. 5 of Ogden Downtown Entertainment Center, 339 East 2550 South, Unit No. 402."

10. Under the financial terms of this agreement, Flores agreed to pay Earnshaw $144,950.00, less the $10,000.00 previously paid when Flores had exercised the earlier Option Agreement.

11. Flores signed and accepted the offer, as contained in the REPC, on April 21, 2006,

and Earnshaw signed the same on May 1, 2006, thus, creating a fully integrated and binding agreement.

12. In early May 2006, Earnshaw called Flores indicating to Flores that he had sold the condominium too cheaply, that he had sold all other units in the building of similar size for $184,950.00, and he could not afford to sell the one to Flores for any less.

13. Earnshaw later sent a faxed Addendum to the REPC to Flores in an effort to correct and adjust the purchase price. The Addendum states:

> "The total selling price referenced on the REPC for the sum of $144,950.00 was made in error. All other units of the like were sold for the price of $184,950.00. Therefore, it becomes necessary to adjust the selling price for the unit (No. 402)."
> [Plaintiff's Exhibit "6".] [Emphasis added.]

Earnshaw further stated in the Addendum that the purchase price shall be $179,950.00, less the $10,000.00 deposit earnest money to be applied at closing.

14. Earnshaw gave Flores twelve (12) days to accept this Addendum or forfeit his deposit, at which time Earnshaw would consider their agreement void. Flores declined.

15. At Trial, Earnshaw contended, contrary to Flores' testimony, that the parties always discussed a purchase price of $184,950.00. He stated that the lower figure contained in the Option Agreement and later in the REPC resulted either from his scrivener's error and/or because of his secretary's error in transcribing his manual numbers to the Option Agreement and later to the REPC.

16. Earnshaw testified that it was always his intention to provide a fully built-out

condominium unit to Flores but only for the price of $184,950.00 but, since Flores seeks to enforce the price of $144,950.00 as written in the contract, then Earnshaw, too, seeks to enforce the express terms of the REPC.

17. Earnshaw contends that paragraph 1.1 of the REPC, as written, requires him to build only a "shell" for Flores because, unless such things as electricity, plumbing, fixtures, etc., were attached to the property when the parties executed their agreement, they are not included in the purchase price. Paragraph 1.1 reads as follows:

> "Included Items. Unless excluded herein, this sale includes the following items *if presently owned and attached to the Property*: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna; satellite dishes and system; permanently affixed carpets; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: None." [Emphasis added.]

18. The facts are undisputed that, at the time the parties contracted, none of the items referenced in paragraph 1.1 could have been attached to the property, because neither Unit No. 402 existed, nor had any part of Earnshaw's condominium building been constructed.

19. It is also undisputed that Earnshaw used a REPC that is normally used in the sale and purchase of an existing piece of improved real estate, despite the fact that, at that time, no physical structure or improved real estate then existed.

20. Earnshaw stands willing, according to his testimony, to provide to Flores all of the

features of a built-out unit, as contained in Earnshaw's marketing materials, but not referenced in the REPC, but only if Flores will pay $184,950.00 that others are paying.

21. On July 3, 2006, Flores recorded a Notice of Claim of Interest against the property.

22. In response, on July 20, 2006, Earnshaw demanded that the Notice of Claim of Interest be withdrawn, claiming it was a wrongful lien under Utah Code Annotated, §38-9-1(6).

23. Thereafter, Flores released his Notice of Claim of Interest on August 24, 2006, but, thereafter, recorded a Notice of Lis Pendens on October 19, 2006, after filing his Complaint in this matter.

24. On December 14, 2006, Plaintiff's Notice of Lis Pendens was subordinated to a Trust Deed of First Community Bank.

25. On February 15, 2007, Earnshaw requested from Flores that his Notice of Lis Pendens be released, but Flores refused on February 21, 2007.

26. As a result, Earnshaw later filed an Answer to Flores' Complaint and a separate Counterclaim against Flores, claiming the recorded Notice of Claim of Interest and Notice of Lis Pendens amounted to a wrongful lien.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Court concludes that paragraph 1.1 of the REPC, referencing items included in

the sale of the property "if presently owned and attached to the Property", creates an uncertain meaning of the parties' intent, a facial deficiency and an impression that other terms are missing.

2. The Court concludes that Flores' testimony concerning his interpretation of the contract for a built-out unit appears reasonable and, in fact, on that matter both parties are in agreement.

3. The Court concludes that the contract is ambiguous with regard to the extent to which the condominium, Unit No. 402, would be built-out.

4. The Court concludes that extrinsic evidence is needed and is admissible to ascertain the parties' intent with respect to that issue only and not as to contract price.

5. The Court finds and concludes that the ambiguity in the contract, with regard to the parties' intent to which Unit No. 402 would be built, is resolved by their testimonies, wherein they both testified there is no dispute that what was intended was a built-out unit.

6. Having concluded that the contract is ambiguous, with regard to the parties' intent as to the extent to which Unit No. 402 would be built, and that extrinsic evidence is therefore admissible to determine said intent, the Court finds, based upon the parties' separate testimony, that there is no dispute on that matter, and that each of the parties intended a built-out unit.

7. The Court concludes that the REPC is an executory contract for the sale and purchase of real property and, under said contract, Flores had an equitable interest in the real property under

the doctrine of equitable conversion.

8. Because Flores had a property interest in the nature of an equitable interest in condominium Unit No. 402 under the REPC, he had authority under Utah Code Annotated, §78-40-2, to record a Lis Pendens as part of "an action affecting the title to or the right of possession of the real property" and to give constructive notice to other potential buyers of Flores' property interest.

9. Flores is entitled to a Judgment of specific performance against Earnshaw at the contract price of $144,950.00, and Earnshaw should build out Flores' condominium, Unit No. 402, consistent with the marketing materials used to sell other condominium units in the Earnshaw Building. Earnshaw should build out Unit No. 402 commensurate with the features and amenities of other similarly-sized units in the building, unless the buyers of those other units have negotiated above the purchase price of $184,950.00 for upgrades.

10. Earnshaw's Counterclaim of wrongful lien should be dismissed, as Flores had validly filed and recorded his Notice of Lis Pendens.

11. Under paragraph 17 of the REPC and under Utah Code Annotated, §78-27-56.5, Flores is entitled to reasonable attorney's fees and costs. Flores is also entitled to reasonable attorney's fees for his successful defense of Earnshaw's claim of wrongful lien, pursuant to Utah Code Annotated, §38-9-7(5)(c).

12. Based upon counsel's Affidavit in support of Attorney's Fees and Costs, Flores is

entitled to Judgment, as and for attorney's fees and costs, in the amount of $9,347.00.

Let Judgment enter accordingly.

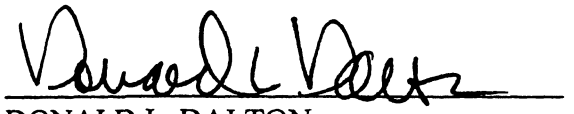
DATED and signed this _____ day of _____, 2007.

BY THE COURT:

_____
MICHAEL D. LYON, District Court Judge

Entered: _____

APPROVED AS TO FORM:



DONALD L. DALTON
Attorney for Defendant

ADDENDUM D

Earnshaw Building

DOWNTOWN CONDOMINIUMS

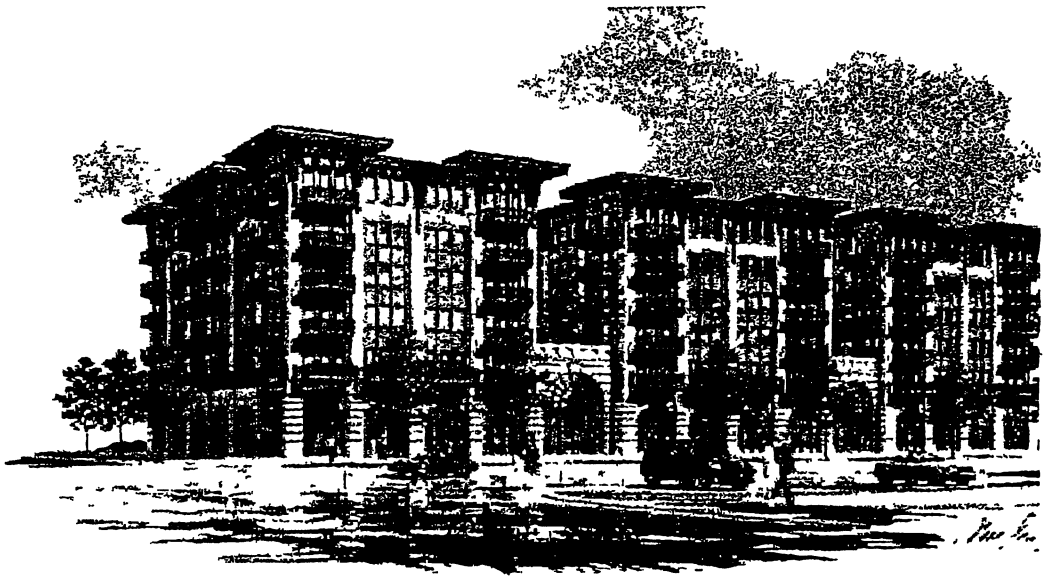
Presented by *Earnshaw Enterprises*
801 898 5542 • earnshawent@networld com

HOME

LOCATION

FEATURES

FLOOR PLANS



WHERE LIFE GETS A LITTLE EASY

Located in Downtown Ogden, Utah at the heart of the Ogden Downtown Entertainment Center

Website design by Persudio Design

TO: Michael

FROM: Seedling Flores

Earnshaw Building

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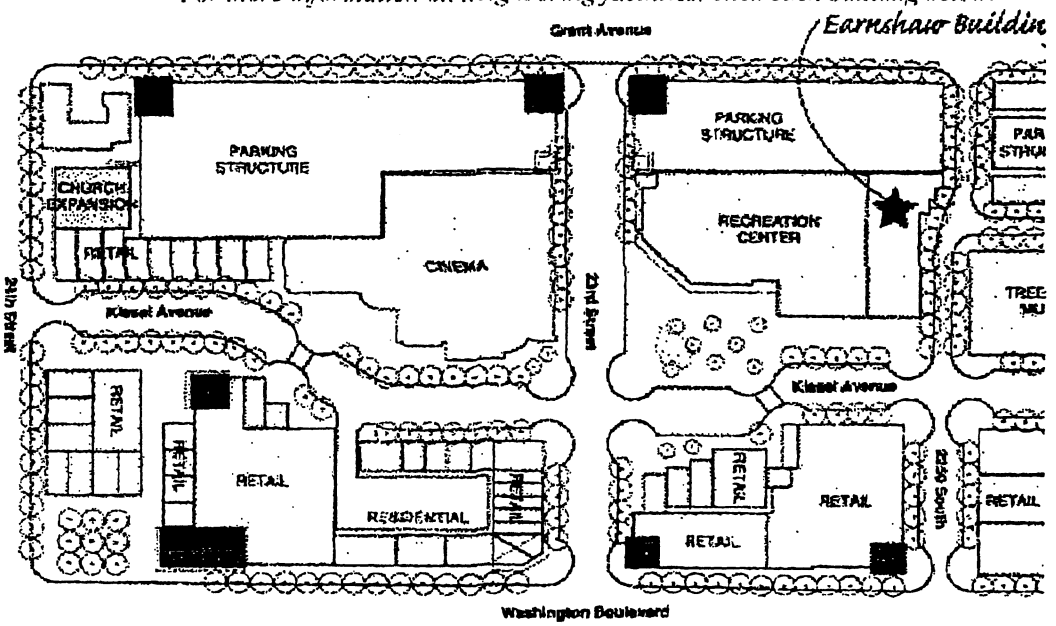
Ogden Downtown Entertainment Center

Within walking distance, the Earnshaw Building offers easy access to specialty shops, theater recreation center, grocery store and deli, fine restaurants and fast foods. Chartered schools are

For more information on neighboring facilities, click each building below.



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Features

- Central Air
- Oversized Bedrooms
- Tile or Wood Entry
- Homeowners Warranty Program
- Raised Panel Arched Solid Core Doors with Colonial Casing and Baseboards
- Telephone Jacks - Master Bedroom, and Kitchen
- Satellite Hook-Ups
- Laundry Hook-Ups
- Choose colors of tile, carpet, counter tops, painting, etc.
- Raised Panel Cabinets
- Tiled Shower/Tub
- Custom Kitchen
- Kitchen Disposal
- Maytag Dishwasher
- Maytag Range with Self Cleaning Oven

Energy Efficiency Package

- Forced Air Heating and Cooling
- Insulated Steel Entry Door
- R-38 Ceiling Insulation
- R-13 Total Wall Composite
- Vapor Barrier Shield Wrap Insulation
- Thermal-Break Insulated Windows

Available Ame

Earnshaw Condor offer swimming p recreation center i ideal for making a community a desi to spend nights an

Main Features

- Security gate pa with key lock en
- Oversized balco to enjoy scenic v and views of Og

At Earnshaw Condominiums continuing product improvement is an important policy The builder reserves the right to ch materials and policies without prior notice Please keep in mind that many of the items which you see are decorator it Plans and perspectives are an artist s concection only and may vary slighdy from the actual building

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HOME

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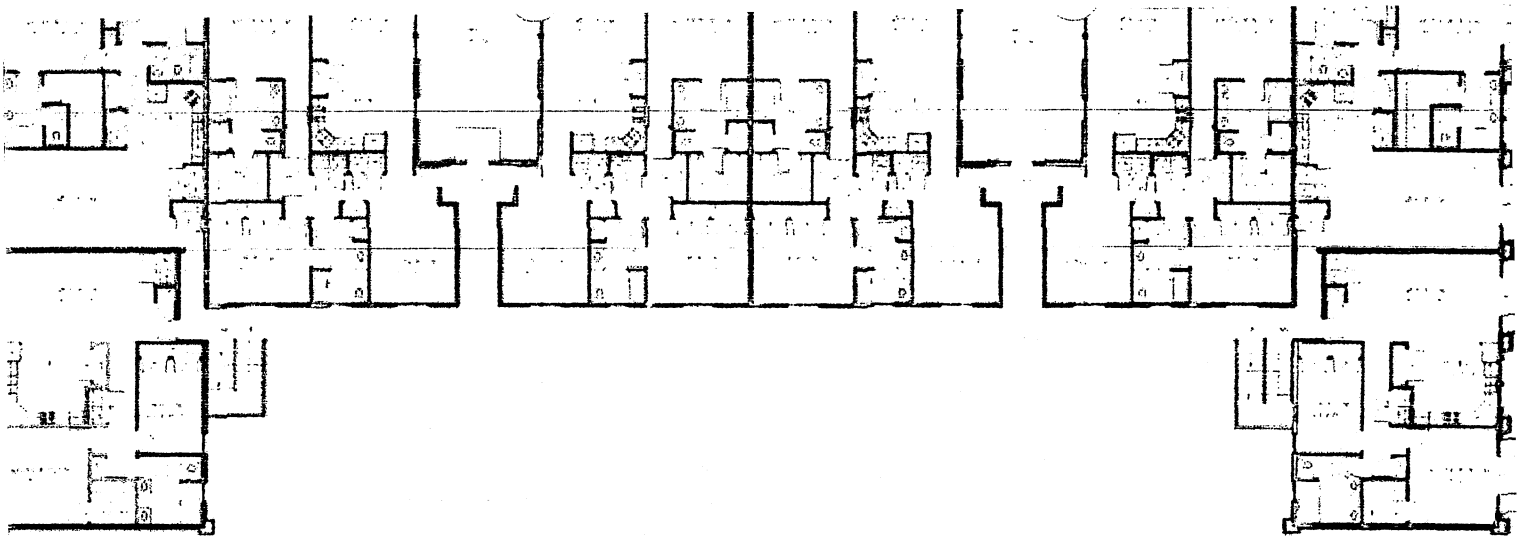
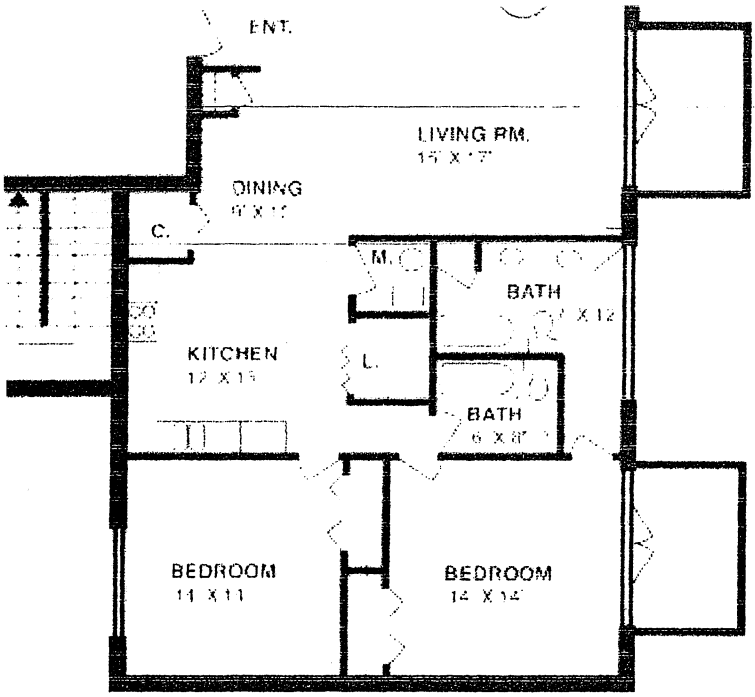
FLOOR PLANS

Choose from our 3 floor plans or design your own floor p

Plan A	*Plan B*	*Plan C*
• 3 Bedrooms	• 2 Bedrooms	• 2 Bedrooms
• Great Room and Den	• Multi-purpose room	• Living Room
• Kitchen with large pantry	• Kitchen Dining Room	• Dining Room
• 2 Bathrooms	• Family Room	• Kitchen
• Laundry Room	• 2 Bathrooms	• 2 Bathrooms
• 3102 sq. ft.	• 2165 sq. ft.	• 1593 sq. ft.
Click here to view unit plan	*Click here to view unit plan*	*Click here to view unit plan*

To view a rendering of *building floor plan 3 & 4, click here.* To view a rendering o *floor plan 5 & 6 click here.* Renderings are meant to show position of units only. P that floors 3 & 4 are designated for Plan C, while floors 5 & 6 are designated for Pl Unit prices start at $184,950.




ENT.
LIVING RM.
15' X 17'
DINING
C.
M.C.
BATH
X 12
KITCHEN
L.
BATH
BEDROOM
11' X 11'
BEDROOM
14' X 14'